Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2010

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

THE UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the California Supreme Court

REPLY BRIEF OF PETITIONER STATE OF CALIFORNIA, *ET AL.*

JOHN K. VAN DE KAMP
Attorney General of the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
(Counsel of Record)
CLIFFORD T. LEE
Deputy Attorneys General
California Attorney General's Office
350 McAllister Street, Room 6000
San Francisco, CA 94102
Tel.: (415) 557-3920
Attorneys for Petitioners
State of California, et al.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

Argument 1

I

Congress in enacting the Desert Land Act and other land laws, statutorily relinquished any "riparian" rights held by the United States in its lands 1

II

The Organic Administration Act of 1897 precludes the United States from asserting riparian rights for wildlife purposes on national forest lands 6

III

The United States constitutionally lacks riparian rights in its lands 7

Conclusion 9

TABLE OF AUTHORITIES

Page

California v. United States, 438 U.S. 645 (1978) 2

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 3, 4, 6

Cappaert v. United States, 426 U.S. 128 (1976) 5

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 8

Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) .. 4, 5

Kansas v. Colorado, 206 U.S. 46 (1907)..... 4

Kleppe v. New Mexico, 426 U.S. 529 (1976) 8

Nebraska v. Wyoming, 325 U.S. 589 (1945) 2

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) ... 8

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 2

United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) 8

United States v. New Mexico, 438 U.S. 696 (1978) ...3, 5, 6, 7

REPLY BRIEF OF PETITIONER STATE OF CALIFORNIA, *ET AL.*

ARGUMENT

The respondents United States and Sierra Club argue that the United States constitutionally has riparian rights in its lands, and that Congress has not relinquished such rights. These arguments, as we shall explain, are inconsistent with Congress' historic policy of making water available to settlers in order to encourage settlement of the arid West. This congressional policy is reflected both in the Desert Land Act of 1877—which "severed" water from the public lands to encourage settlement—and the Organic Administration Act of 1897, which provided that unreserved water is free for the settlers' needs. Indeed, this congressional policy is reflected in the inherent constitutional limitations on the federal property power. The respondents' argument would turn this congressional policy on its head by creating a new federal "riparian" right that has never been recognized or asserted before. This Court should reaffirm Congress' historic settlement policy by granting the petition and reversing the lower decision.

I

CONGRESS, IN ENACTING THE DESERT LAND ACT AND OTHER LAND LAWS, STATUTORILY RELINQUISHED ANY "RIPARIAN" RIGHTS HELD BY THE UNITED STATES IN ITS LANDS

In our petition, we argued that Congress, in enacting the Desert Land Act and other land laws, relinquished the United States' property rights in unreserved water, thereby relinquishing any federal "riparian" rights. Pet. 8-9, 17-22. The purpose of the relinquishment, we argued, was to make water available to the settlers and encourage disposition of the public domain. *Id.* In reply, the respondents argue that California's position is inconsistent with Congress' traditional policy of requiring the United States to acquire water rights for unreserved purposes under state law. U.S. Br. 11-12; Sierra Br. 7-15. According to their argument, this congressional policy, as applied in riparian states, allows the

United States optionally to comply with state appropriation laws or to assert riparian rights in its lands. *Id.*

Contrary to the respondents' argument, a congressional directive that the United States must acquire water rights under state law does not mean, or even imply, that the United States has riparian rights in its lands. The riparian right is conceptually different than the appropriative right in highly material respects. The riparian right attaches to land and is irrelevant to use, while the appropriative right belongs to the appropriator and is based on actual beneficial use. Pet. 5, 10. The United States' property rights in its lands—including any "riparian" rights—flow from the Property Clause, while the United States' obligation to acquire appropriative rights flows from congressional directives requiring the United States to divert water for specific use in accordance with state law. *Id.* Therefore, when Congress directs the United States to divert water for specific uses in accordance with state law, Congress presumably intends for the United States to proceed as an appropriator rather than a riparian, because the appropriative right—unlike the riparian right—is tailored to the specific *use* contemplated by Congress. Moreover, since federal "riparian" rights exist, if at all, by force of the Property Clause rather than Congress, it is doubtful that Congress can "direct" the United States to possess such rights in any event.

Indeed, when Congress has required the United States to acquire water rights under state law, it has consistently indicated that the United States must proceed as an appropriator rather than a riparian. According to this Court, the Reclamation Act of 1902 requires the United States to "appropriate" water for reclamation purposes in accordance with state law—both in California, which recognizes riparian rights, and in Wyoming, which does not. *California v. United States*, 438 U.S. 645, 665 (1978) (California); *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945) (Wyoming). Indeed, this Court held that, although California recognizes "common-law riparian-rights doctrine, . . . the United States, on the other hand, by virtue of the Reclamation Act, stands in the position of an upstream *appropriator* for beneficial use." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-743 (1950) (emphasis added). Similarly, this Court has held that

the Organic Administration Act of 1897 requires the United States to proceed "in the same manner as any other public or private *appropriator*" in acquiring water rights for secondary uses in national forests. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (emphasis added).[1] Thus, Congress has consistently required the United States to comply with state *appropriation* laws in carrying out functions involving water use. The United States' assertion that California's position "prohibits Congress from placing the United States in the same shoes 'as any other public or private appropriator,' " U.S. Br. 9, is both wrong and inexplicable, and confuses the difference between riparian and appropriative rights.

On the other hand, Congress has never indicated, directly or impliedly, that the United States can or should claim *riparian* rights in its lands in carrying out any authorized congressional purpose. To the contrary, Congress' land laws, particularly the Desert Land Act of 1877, "severed" land and water, see *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935), thus relinquishing the United States' property rights in water. The purpose of the severance was to make water available to settlers in order to encourage settlement, see Pet. 8-9, 18-20, and this purpose is not consistent with a federal riparian right, which would have limited such availability and discouraged settlement. Moreover, since the United States already has a federal right to reserve water for primary reservation uses, and can acquire additional water rights under state appropriation laws, a federal "riparian" right is unnecessary to serve any federal interest not adequately protected under existing water law doctrines.[2]

---

[1] The respondents argue that the Court in *New Mexico* meant only that the United States must proceed as an "appropriator" in states, such as New Mexico, that exclusively recognize appropriative rights. U.S. Br. 10 n. 9; Sierra Br. 17. In the cited reference, however, the Court was referring to Congress' general policy of deferring to state appropriation laws, not to New Mexico's special appropriative system. See *New Mexico*, 438 U.S. at 702.

[2] Further, as explained in the petition, recognition of a federal "riparian" right would impair the states' ability to plan and manage the allocation of their water resources, and would create uncertainty with

The respondents make several arguments to support their contention that the Desert Land Act did not terminate the United States' "riparian" rights. First, they argue that the sole purpose of the severance was to require deference to state water law; *ergo*, since California recognizes riparian rights, the United States has riparian rights in California. U.S. Br. 9-10, 11-12; Sierra Br. 7-10. To be sure, this Court in *California Oregon Power* held that the Desert Land Act reaffirmed the states' constitutional authority to adopt and administer their own water law systems, and therefore that the states have the right to adopt either the appropriation doctrine or the riparian doctrine; "Congress cannot enforce either rule upon any state." *California Oregon Power*, 295 U.S. at 163-164, quoting from *Kansas v. Colorado*, 206 U.S. 46, 94 (1907). As explained above, however, the Desert Land Act, beyond simply deferring to state water law, meant to make water available to the settlers in order to encourage settlement of the West. This settlement purpose is not consistent with a federal "riparian" right, for the settlers could not have obtained the water if the United States had retained its sovereign rights in the water.

Therefore, although Congress reaffirmed the states' constitutional authority to adopt their own water laws, it also precluded the United States itself from asserting riparian rights in its lands. Although Congress did not "federalize" the doctrine of appropriation, as the Sierra Club properly notes, Sierra Br. 9 n. 5, Congress did adopt a national policy precluding the United States from asserting water rights simply on the basis of its sovereign land ownership. Under this national policy, the United States must proceed as an appropriator rather than a riparian in acquiring water rights under state law. This national policy is reflected in Congress' reclamation and forest statutes, described above, requiring the United States to proceed as an "appropriator" under state law.

Second, the respondents argue that the Desert Land Act, although severing land and water, does not apply on federal

---

respect to existing appropriative and riparian rights. Pet. 23-27. The amici briefs of the Association of California Water Agencies, *et al.*, and the Friant Water Users Authority describe the consequences of such uncertainty in substantial detail.

reserved lands, citing this Court's decisions in *Federal Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 448 (1955), and *Cappaert v. United States*, 426 U.S. 128, 143-144 (1976). U.S. Br. 12; Sierra Br. 2, 10-11. In *Pelton Dam* and *Cappaert*, the States of Oregon and Nevada respectively argued that the Desert Land Act, by severing land and water, authorized state regulation of federal water uses on reserved lands. This Court rejected the States' argument, holding that the Desert Land Act does not apply on reserved lands. Neither *Pelton Dam* nor *Cappaert* considered whether the Desert Land Act affected any "riparian" rights held by the United States in its lands, which is the question presented here.

This Court's view in *Pelton Dam* and *Cappaert* that the Desert Land Act does not apply on reserved lands is inconsistent with this Court's recent decision in *United States v. New Mexico, supra*, 438 U.S. 696, which held that state appropriation laws apply on *reserved* lands with respect to federal secondary uses. Pet. 20-21. After *New Mexico*, the proper analysis is that the Desert Land Act creates an inference that state appropriation laws apply to secondary uses on reserved lands, but not to primary uses. The respondents, in reply, assert that *New Mexico* did not consider whether the United States has riparian rights in its lands. U.S. Br. 12 n. 10; Sierra Br. 11 n. 6.[3] This assertion, although correct, does not respond to our argument that *New Mexico* overturned, *sub silentio*, the analysis in *Pelton Dam* and *Cappaert* that the Desert Land Act does not apply on reserved lands. Moreover, if the Desert Land Act does not apply on reserved lands, there is no basis for the respondents' argument that the

---

[3] The Sierra Club erroneously asserts that this Court in *New Mexico* "did not even mention those Acts [the Desert Land Act and Mining Act] as the theoretical underpinning of its ruling . . . " Sierra Br. 11 n. 6. To the contrary, *New Mexico* specifically referred to a Senate committee report that, in the Court's words, "list[ed] 37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from *the Mining Act of 1866* . . . to the Act of Aug. 28, 1958, . . . " 438 U.S. at 702 n. 5 (emphasis added). As noted in the petition, the 37 statutes listed in the Senate report included the Desert Land Act and the Mining Acts of 1866 and 1870. Pet. 21.

United States has riparian rights under *state* law on the reserved lands involved here. Thus, the respondents' argument is internally inconsistent in any event.

Third, the respondents argue that this Court in *California Oregon Power*, in holding that the Desert Land Act severed land and water, "meant only that when federal lands were granted to private individuals for agricultural or homesteading purposes, no federal water rights were transferred." Sierra Br. 2. In effect, the respondents argue that Congress did not *sever* the United States' property rights in water, but instead precluded the *transfer* of such rights to its grantees. This argument would transform the historic severance principle into a modest restriction against transferability. This argument is inconsistent with the purpose of the severance enunciated in *California Oregon Power*, which was to relinquish federal property rights in water in order to make water available to the settlers. This purpose is not served if the United States retains its own property rights in water, whether or not it transfers such rights to grantees. Therefore, the severance applied to the United States' own rights, not just those of its grantees. The reason that grantees do not obtain riparian rights as part of their grants is not that the United States has not conveyed such rights, but because the United States has no such rights to convey. The respondents' transferability argument would transmute and modify the historic severance principle enunciated in *Calfornia Oregon Power*.

II

THE ORGANIC ADMINISTRATION ACT OF 1897 PRECLUDES THE UNITED STATES FROM ASSERTING RIPARIAN RIGHTS FOR WILDLIFE PURPOSES ON NATIONAL FOREST LANDS

In *United States v. New Mexico, supra*, 438 U.S. 696, this Court held that the Organic Administration Act of 1897 precludes the United States from reserving water for wildlife uses on national forest lands, reasoning that such a reservation would defeat the Act's purpose in making water available to the settlers. In our petition, we argued that *New Mexico* supports the view that

the United States cannot assert *riparian* rights for the same wildlife purposes, since such rights would equally defeat the Act's purpose in making water available to the settlers. Pet. 9, 22-23.

The respondents argue that *New Mexico* held only that the United States must acquire water rights for secondary reservation purposes under state law, and that the United States "is no less entitled to obtain that water if it chooses to invoke its state-recognized riparian rights rather than appropriative rights." U.S. Br. 13; see Sierra Br. 23-27. The reasoning of *New Mexico*, however, is that the United States cannot assert *any* property rights in water for wildlife purposes that would diminish availability of water to the settlers. Thus, although *New Mexico* considered the question in a reserved rights context, its reasoning applies equally to the riparian context involved here.

The United States argues that Congress' policy of making water available to settlers would be defeated in any event if, as we argue, the United States can acquire water rights for wildlife purposes under state *appropriation* laws. U.S. Br. 13-14. To the contrary, Congress meant only to preclude the United States from asserting water rights simply on the basis of its sovereign land ownership, and did not mean to preclude the states from balancing federal needs against the settlers' needs under their appropriation laws, in order to achieve maximum beneficial uses of the state's sparse water supply. As we have noted, the appropriation doctrine, unlike the riparian doctrine, allows the state to weigh a proposed use against competing uses in order to determine whether the right should be granted. Pet. 10, 26. Congress thus preserved the states' authority to balance federal secondary needs against competing needs under their appropriation laws, and only precluded the United States from circumventing the appropriation process by asserting rights on the basis of its sovereign land ownership.

III

THE UNITED STATES CONSTITUTIONALLY LACKS RIPARIAN RIGHTS IN ITS LANDS

In our petition, we argued that the Property Clause occupies the field of the United States' property rights in its lands, and therefore the United States does not have riparian rights held by ordinary landowners under state common law. Pet. 5-8, 12-17. The respondents argue that the United States has both proprietary and sovereign rights in its lands, citing dictum to that effect in *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). U.S. Br. 9-10; Sierra Br. 21. As noted in the petition, the United States does have both proprietary and sovereign rights in its lands, but such rights arise under the Property Clause rather than state common law. Pet. 13-14. Moreover, *Kleppe* held only that Congress has *constitutional* power to regulate wild horses and burros on public lands, and did not consider whether the United States has ordinary property rights under state law.

The respondents also argue that the United States possesses ordinary property rights under the *Clearfield Trust* doctrine. U.S. Br. 9; Sierra Br. 19-20. Under this doctrine, the federal courts may "borrow" state law to develop a uniform rule of federal common law, assuming that a constitutional or statutory interstice exists and that state law is congruent with federal policy. See, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-595 (1973). Since federal law already authorizes the United States to reserve water for use on its lands, there is no constitutional or statutory interstice that justifies the "borrowing" of state riparian laws. Moreover, since the Desert Land Act and Organic Administration Act were intended to make water available to settlers in order to encourage settlement, the "borrowing" of state riparian laws—which would limit availability of water to the settlers—is not congruent with congressional policy. Finally, the *Clearfield Trust* doctrine establishes a uniform body of federal law, and thus does not authorize the United States to assert riparian rights under *state* law. Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("Any state law applied . . . will be absorbed as federal law and will not be an independent source

of private rights"). For these reasons, the *Clearfield Trust* doctrine does not apply here.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON
CLIFFORD T. LEE
Deputy Attorneys General
Attorneys for Petitioners
State of California, et al.